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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DARYL KILGORE, Defendant and Appellant.	2d Crim. No. B173082 (Super. Ct. No. CR36851) (Ventura County)

Appellant Daryl Kilgore entered a plea of guilty to two counts of felony unlawful offer and receipt of consideration for the referral of a client (counts 1 and 2). (Ins. Code, § 750, subd. (a).) Three other charged offenses were dismissed: two additional counts of a section 750 violation and one count of conspiracy to commit a crime. (Pen. Code, § 182, subd. (a)(1).)

Appellant was sentenced to two years eight months in state prison computed as follows: the midterm (two years) on count 1, and one-third the midterm (eight months) on count 2. He appeals his conviction, contending the trial court abused its discretion when it failed to reduce the offense to a misdemeanor. (Pen. Code, § 17.) We affirm.

FACTS

In 1995 appellant contacted a personal injury attorney in Ventura County, identifying himself as an investigator of personal injury cases. He offered to provide

personal injury clients to the attorney's law firm for a fee of $1,300 per client. The attorney agreed to meet with appellant and contacted the district attorney's office. An undercover investigator for the district attorney posed as an associate at the law firm.

The following day, appellant and a codefendant, Andre Holloway, met with the attorney and undercover investigator. Appellant indicated that he and Holloway owned tow trucks and body shops in the Los Angeles area and had "standing agreements" with health care practitioners, chiropractors and doctors. A medical bill for treating an injured person would average $3,500 to $4,000. The doctors would "kick back" to the law firm 40 percent of the medical fees recovered from the insurance companies. Appellant gave the attorney the names and phone numbers of several doctors and lawyers who could provide "references." The attorney gave appellant standard documents used by the law firm: retainer agreements, lien agreements, releases to obtain information and a California designation form. The meeting was tape-recorded.

Several days later appellant sent a 12-page fax to the attorney's office containing information about four personal injury clients and a summary of the alleged accidents. Appellant told the attorney that the referral fee would be $5,200. The undercover investigator subsequently visited one of the doctors at his medical office. The doctor acknowledged that he was treating the four personal injury clients referred by appellant and Holloway and would kick back 40 percent of the medical bills once the case was settled. He requested a copy of the settlement check before rebating 40 percent of the medical bills to the law firm.

Appellant and Holloway visited the law firm on June 9, 1995. They showed the investigator four vouchers of settlement checks provided by insurance companies. The investigator paid them $5,200 as a referral fee. Appellant and Holloway were arrested after they completed the transaction.

When he committed the instant offense, appellant was a fugitive from justice for a crime committed in Arizona. While out on bail for the California offense, he visited Arizona and was arrested. He was sentenced to two consecutive seven-year

prison terms and has remained in custody in Arizona since 1997. Appellant was returned to California for trial in late 2002.

Plea Agreement and Sentencing Hearing

The plea agreement indicated that appellant faced a maximum possible prison sentence of three years eight months and the plea offer was for two years eight months. Across the first page of the plea agreement was written, "2Y 8 mos. cons. to AZ sentence." Under the section entitled "court's position on sentence," the court had written and initialed "2 years 8 mos c/s." Defense counsel argued for a two-year sentence and the trial court informed him he could raise this issue at the sentencing hearing. The court accepted appellant's plea.

The probation report indicated that the sentencing range for a violation of Insurance Code section 750 (counts 1 and 2) was "1 yr/16-2-3." The probation officer recommended that probation be denied and appellant be committed to the California Department of Corrections. According to the report, there were several circumstances in aggravation and none in mitigation. The crime was carried out in a way that indicated planning, sophistication, or professionalism; appellant's prior convictions were numerous; and he had served prior prison terms.

At the probation and sentencing hearing, the court stated that it had read the probation report. The prosecutor asked the trial court to impose a sentence of two years eight months to run consecutive to the Arizona sentence and requested that appellant be returned to Arizona to continue serving his sentence there. Defense counsel asked the court to consider a sentence of less than two years eight months. Counsel argued that the Arizona offense was a nonviolent crime, contrary to a statement in the probation report that the crime involved violence. Appellant did not ask the court to reduce his offense to a misdemeanor, and there is no indication in the record that appellant filed a motion to this effect pursuant to Penal Code section 17, subdivision (b).

After hearing argument, the trial court asked counsel, "What's the sentencing triad on a violation of section 750 of the Insurance Code? [¶] [District Attorney]: I believe it's two, three, five. [¶] [Defense Counsel]: Something similar to

that, your Honor. [¶] [Court]: Close enough for government work? [¶] [Defense counsel]: I would love to be mistaken on the downward side, but I don't recall. [¶] [District Attorney]: [I]t's sixteen, two, three. But it looks like each count must run consecutive according to the note I have in the file."

The court immediately pronounced sentence, stating, "Probation is denied. Defendant is committed to the Department of Corrections on Count 1 for the midterm of two years; as to Count 2, midterm, or eight months, to be serve[d] consecutive to Count 1. Total fixed term of two years, eight months to be served consecutively to his current commitment in the State of Arizona under case CR 52013."

DISCUSSION

Insurance Code section 750, subdivision (a) prohibits an individual from receiving consideration for the referral or procurement of clients.[1] This offense is a "wobbler" which, in the court's discretion, may be punished as either a misdemeanor or a felony. (Pen. Code, § 17, subds. (a), (b); Ins. Code, § 750, subd. (b); *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974.) The trial court may reduce an offense originally charged as a felony by either imposing a misdemeanor sentence or by declaring it a misdemeanor upon a grant of probation. (Pen. Code § 17, subds. (b)(1), (b)(3); *Alvarez*, at p. 974.)

A first conviction for a section 750 violation may be punished as either a misdemeanor or a felony. Under Insurance Code section 750, subdivision (b), "A violation of subdivision (a) is punishable upon a first conviction by imprisonment in the county jail for not more than one year, or by imprisonment in the state prison, or by a fine not exceeding fifty thousand dollars ($50,000), or by both that imprisonment and fine. A

[1] Insurance Code section 750, subdivision (a) provides in part "[A]ny person acting individually or through his or her employees or agents, who engages in the practice of processing, presenting, or negotiating claims, including claims under policies of insurance, and who offers, delivers, receives, or accepts any rebate, refund, commission, or other consideration, whether in the form of money or otherwise, as compensation or inducement to or from any person for the referral or procurement of clients, cases, patients, or customers, is guilty of a crime."

second or subsequent conviction is punishable by imprisonment in the state prison or by imprisonment in the state prison and a fine of fifty thousand dollars ($50,000)."

Appellant claims the trial court abused its discretion by failing to reduce his sentence to a misdemeanor. He contends the court 1) was unaware that a first violation of Insurance Code section 750 is a "wobbler" and 2) did not know that it had the discretion to impose concurrent sentences on counts 1 and 2. Appellant asserts the matter must be remanded for resentencing because the court did not understand the scope of its discretionary powers and thus failed to exercise its discretion.

"'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at pp. 977-978.) To meet his burden, the appellant must "affirmatively demonstrate that the trial court misunderstood its sentencing discretion." (*People v. Davis* (1996) 50 Cal.App.4th 168, 172 [court believed it lacked discretion to strike a prior felony conviction]; *People v. Alvarez* (1996) 49 Cal.App.4th 679, 694-696.) If the record is silent, the appellant has failed to sustain his burden of proving error and we affirm. (*Davis*, at p. 172.)

In making its sentencing choices, the trial court relied on the probation report which recommended that appellant be committed to state prison. The report listed three aggravating factors and indicated that the sentencing range for a section 750 violation was "1 yr/16-2-3." We conclude that the court, having read the probation report, understood the sentencing range and chose to punish the offense as a felony. (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at pp. 977-978; *People v. Diaz* (1992) 3 Cal.4th 495, 567 [we presume that the trial court has properly followed established law].) The court and counsels' verbal exchange does not change this result.

We reject appellant's argument that the court abused its discretion by imposing consecutive sentences. He cites no authority for the proposition that it was obligated to impose concurrent sentences. To the contrary, a trial court is statutorily

authorized to impose either concurrent or consecutive sentences when a person is convicted of two or more crimes. (Pen. Code, § 669.) Appellant has failed to meet his burden of demonstrating the court misunderstood its sentencing discretion.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Bruce A. Clark, Judge

Superior Court County of Ventura

Law Offices of Pritz & Associates, Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.